Table of Contents

	PAGE
Preliminary Comments	1
Question Presented	1
Constitutional Amendment, Statutes and Rules Involved	2
Statement	2
Argument:	
The constitutionality of a statute requiring, inter alia, abortions to be performed only in a licensed and accredited hospital, was not properly raised at trial nor preserved for appellate review, where no attempt was made to raise this issue until the conclusion of the State's case; where the issue was attempted to be raised without presentation or proffer of any evidence or argument; where the issue was attempted to be raised by a motion challenging the sufficiency of the evidence to sustain a conviction; and where the issue was attempted to be raised in violation of a rule requiring it to be raised prior to trial	4
Conclusion	9
Appendix A:	
Chapter 63, Section 2, of the Laws of Maryland of 1852, codified as Article 27, Section 649, Annotated Code of Maryland (1939)	1a.
Appendix B:	
Rule 3, General Rules of Practice and Procedure of Maryland	2a

Table of Citations

Cases

Bonneville v. State, 206 Md. 302, 111 A. 2d 669 (1955)	7
Cowman v. State, 12 Md. 236 (1858)	7
Ellis v. Dixon, 349 U.S. 458	5, 8
Foote v. State, 59 Md. 264 (1883)	7
Gray v. State, 4 Md. App. 175, 241 A. 2d 909 (1968)	8

PAGE

Griswold v. Connecticut, 381 U.S. 479 9
Henry v. Mississippi, 379 U.S. 443 (1965) 4, 5
Martel v. State, 221 Md. 294, 157 A. 2d 437, cert. den. 363 U.S. 849 (1960) 7
Parker v. North Carolina, 397 U.S. 790 (1970) 5
State v. Cherry, 224 Md. 144, 167 A. 2d 328 (1961) 8
State v. Lassotovitch, 162 Md. 147, 159 A. 362 (1932) 7
Sullivan v. Little Hunting Park, 396 U.S. 229 5
United States v. International Union, 352 U.S. 567 8
Williams & McClelland v. State, 5 Md. App. 450, 247 A. 2d 909 (1968) 8
Zorach v. Clauson, 343 U.S. 306 5

Statutes

Annotated Code of Maryland:
Article 27, Section 649 (1939) 2, 1a
Article 43, Sections 137-139 (Cum. Supp. 1970) 2
Laws of Maryland of 1852:
Chapter 63, Section 2 ..... 2, 1a, 7
United States Constitution:
14th Amendment 2

Miscellaneous

Federal Rule of Criminal Procedure:
Rule 12 (b) (2) 5
General Rules of Practice and Procedure:
Rule 3 ..... 2, 2a, 7
Gould, Criminal Pleading in Maryland, page 74 (Vail-Ballou Press, 1936) 7
Maryland Rules of Procedure:
Rule 725 ..... 2, 2a, 7
Rule 725 (b) 4, 7
Rule 755 ..... 2, 3, 4, 7
Rule 1071 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1533

MILAN M. VUITCH, M.D.,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY COMMENTS

This Brief in Opposition to the Petition for Writ of Certiorari is filed pursuant to the request of this Honorable Court.

QUESTION PRESENTED

Was the constitutionality of a statute properly raised at trial or preserved for appellate review, where no attempt was made to raise this issue until the conclusion of the

State's case; where the issue was attempted to be raised without presentation or proffer of any evidence or argument; where the issue was attempted to be raised by a motion challenging the sufficiency of the evidence to sustain a conviction; and where the issue was attempted to be raised in violation of a rule requiring it to be raised prior to trial?

CONSTITUTIONAL AMENDMENT, STATUTES AND RULES INVOLVED

The due process and equal protection clauses of the 14th Amendment to the United States Constitution; Maryland Code, Annotated, Article 43, Section 137-139 (Cum. Supp. 1970), and Rules 725, 755 and 1071 of the Maryland Rules of Procedure were included as Appendix A to Petitioner's brief. Chapter 63, Section 2, of the Laws of Maryland of 1852, codified as Article 27, Section 649, Annotated Code of Maryland (1939), and Criminal Rule 3 of the General Rules of Practice and Procedure of Maryland, are attached hereto, respectively, as Appendix A and Appendix B.

STATEMENT

Petitioner is a physician licensed to practice medicine in the States of Maryland and New York, the Commonwealth of Virginia and the District of Columbia. He was convicted in the Circuit Court of Montgomery County, Maryland, on charges of having performed an abortion in violation of Maryland law, *i.e.*, at "a location which is not a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene * * *" (Maryland Code Annotated, Article 43, Section 139 (Cum. Supp. 1970)). A sentence of three years' imprisonment (with two years to be suspended after one year is served) and $5,000 fine was imposed. Subsequent

to sentencing, petitioner was admitted to bail pending appeal.

At the trial evidence was introduced showing, *inter alia*, that Petitioner had performed an abortion on November 23, 1968 on one Rebekah Jane Dodson, in his office which was not a licensed or accredited hospital. No challenge to the constitutionality of the statute was made by Petitioner until the close of the State's case, when he attempted to raise the issue by a written motion for judgment of acquittal pursuant to Rule 755 of the Maryland Rules of Procedure. This Rule relates only to sufficiency of evidence. The motion was denied without comment. Thereafter Petitioner offered evidence and by so doing, under the Rule, the motion was withdrawn. (See Appendix A in Petitioner's brief.)

Petitioner testified that he did not perform any abortion and that the girl in fact was not pregnant, despite contradictory testimony from a pathologist he called as a witness. No evidence was introduced or proffered with respect to the constitutionality of the abortion statute. At the end of the trial the above motion was renewed and was again denied without comment.

Following denial of his motion for a new trial, Petitioner appealed to the Maryland Court of Special Appeals. The court held that the constitutional challenge was not properly preserved for appellate review since Maryland law requires the issue to be raised by motion prior to trial and since the "complex constitutional questions" could not be resolved in the absence of any evidence in the record. Petitioner's subsequent motion for remand and petition for certiorari in the Maryland Court of Appeals were denied.

ARGUMENT

THE CONSTITUTIONALITY OF A STATUTE REQUIRING, INTER ALIA, ABORTIONS TO BE PERFORMED ONLY IN A LICENSED AND ACCREDITED HOSPITAL, WAS NOT PROPERLY RAISED AT TRIAL NOR PRESERVED FOR APPELLATE REVIEW, WHERE NO ATTEMPT WAS MADE TO RAISE THIS ISSUE UNTIL THE CONCLUSION OF THE STATE'S CASE; WHERE THE ISSUE WAS ATTEMPTED TO BE RAISED WITHOUT PRESENTATION OR PROFFER OF ANY EVIDENCE OR ARGUMENT; WHERE THE ISSUE WAS ATTEMPTED TO BE RAISED BY A MOTION CHALLENGING THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN A CONVICTION; AND WHERE THE ISSUE WAS ATTEMPTED TO BE RAISED IN VIOLATION OF A RULE REQUIRING IT TO BE RAISED PRIOR TO TRIAL.

Petitioner concedes that the first challenge to the constitutionality of the statute under which he was convicted was made by a motion for judgment of acquittal pursuant to Rule 755 of the Maryland Rules of Procedure, following completion of the State's case. The Court of Special Appeals of Maryland, on appeal, held that the issue was required to be raised prior to trial pursuant to Rule 725 (b) of the Maryland Rules of Procedure; that the function of a motion for judgment of acquittal was solely to challenge the sufficiency of the evidence to convict; and that in any event the issue of constitutionality involved mixed questions of fact and law and could not be reviewed on appeal in the absence of any evidence.

Petitioner, relying primarily on *Henry v. Mississippi*, 379 U.S. 443 (1965), claims that his failure to comply with Rule 725 (b), *supra*, may not foreclose a constitutional attack on the statute. In this connection, he suggests that the rule requiring the constitutionality issue to be raised prior to trial was "not previously clearly announced and never before applied".

Henry v. Mississippi, supra, held that "* * * a litigant's procedural defaults in state proceedings do not prevent

vindication of his federal rights unless the state's insistence on compliance with its procedural rule serves a legitimate state interest", 379 U.S. at 447. The more general statement of the rule has been that review by this Honorable Court is barred if the decision of the state court rests on an independent or adequate state ground. *Zorach v. Clauson*, 343 U.S. 306, footnote 7; *Ellis v. Dixon*, 349 U.S. 458, 463; *Sullivan v. Little Hunting Park*, 396 U.S. 229, dissenting opinion at 244. This Court has most recently stated in *Parker v. North Carolina*, 397 U.S. 790 at 798:

> "We also have before us the question whether the indictment to which Parker pleaded is invalid because members of his race were allegedly systematically excluded from the grand jury which returned the indictment. The North Carolina Court of Appeals refused to consider the claim since under North Carolina law an objection to the composition of the grand jury must be raised by motion to quash the indictment prior to the entry of the guilty plea. Because Parker had failed to raise his objection in timely fashion, relief was unavailable. This state rule of practice would constitute an adequate state ground precluding our reaching the grand jury issue if this case were here on direct review. * * *. We are under similar constraint when asked to review a state court decision holding that the same rule of practice requires denial of collateral relief."

There can be little doubt that the procedural rule, virtually identical to Federal Rule of Criminal Procedure 12 (b)(2), serves a legitimate state interest, once it is understood that a defense of, as well as an attack on the constitutionality of a statute often, as in this case, requires the introduction of evidence. The state cannot reasonably be expected to proceed to trial in every criminal case with evidence and witnesses lined up and standing by, on the mere chance that a challenge to the constitutionality

of the statute involved *might* be made during the trial. Where the issue is raised after the trial has commenced the state cannot, under the prohibitions of double jeopardy, terminate the trial to engage in a search for witnesses and evidence. Similarly, to interrupt a trial, possibly for a long period of time, while this search for evidence is conducted, can cause a serious interruption to the continuity of the trial, can break the jurors' train of concentration, and could be grossly wasteful of the jurors' time.

Petitioner cannot take the position that this issue could have been resolved without the introduction of evidence in view of the extensive amount of "evidence" he attempted, improperly, to inject into this case, for the first time, on appeal to the Court of Special Appeals, by attachments to his brief. See also Appendix E in Petitioner's brief to this Honorable Court. Although Petitioner attempted a broader attack on the entire statute, the sole portion of the statute at issue was the requirement that abortions be performed only "in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene", since this is the only part of the statute Petitioner was charged with violating. In his brief on direct appeal, Petitioner alleged that this requirement was "void for vagueness, uncontrolled delegation of legislative authority and unjustifiable discrimination with respect both to physicians and to their patients". One may look no further than to Petitioner's Appendix E, for example, to realize that substantial evidentiary facts are involved in ruling on merely the alleged discrimination argument. As previously stated, the State cannot be expected to have testimony and evidence at hand to controvert the possible evidence of a defendant on the *chance* that the issue will be raised. The rule clearly serves a legitimate state interest.

Petitioner makes the further contention that the requirement that the constitutional challenge be made pre-trial was not "previously clearly announced and never before applied". In fact, the requirement that such a challenge be made prior to trial has existed in Maryland, either by statute or rule of court, without interruption since Chapter 63 of the Laws of Maryland of 1852. (Respondent's Appendix A.) In *Foote v. State*, 59 Md. 264 (1883), at 266, it was stated:

> "Since the Act of 1852, Chapter 63, the usual and only proper mode of testing the constitutionality of an Act of Assembly under which a party is indicted, is by demurrer to the indictments."

See also, to the same effect, *Cowman v. State*, 12 Md. 236 (1858); *State v. Lassotovitch*, 162 Md. 147, 159 A. 362 (1932); Gould, Criminal Pleading in Maryland, page 74 (Vail-Ballou Press, 1936); and *Bonneville v. State*, 206 Md. 302, 111 A. 2d 669 (1955), where the Court stated at page 671:

> "As a matter of procedure, a motion to dismiss the indictment under Rule 3 of the Rules of Criminal Practice and Procedure, which has susperseded a demurrer in cases where a demurrer would previously have been appropriate, is proper to test the sufficiency of the indictment."

The Act of 1852 was superseded by Rule 3 of the General Rules of Practice and Procedure (Respondent's Appendix B), which was adopted December 6, 1949 effective January 1, 1950. Rule 3 was recodified, without substantive change, as Rule 725 effective January 1, 1957. For an analogous application of Rule 725 (b) see *Martel v. State*, 221 Md. 294, 157 A. 2d 437, cert. den. 363 U.S. 849 (1960).

It should be added that it has been held repeatedly that the sole function of Rule 755 is to test the sufficiency of

the evidence. *Williams & McClelland v. State*, 5 Md. App. 450, 247 A. 2d 731 (1968); *Gray v. State*, 4 Md. App. 175, 241 A. 2d 909 (1968).

However, Petitioner's procedural defaults were not the only reason the Maryland Court of Special Appeals felt unable to rule on the constitutional issue. Equally controlling was the complete absence of evidence. The court said (page 15a of Petitioner's brief):

> "But it would be foolhardy in the extreme to undertake the resolution of such complex constitutional questions upon a record as procedurally and substantively deficient as that now before us — one in which the constitutional questions, though readily apparent prior to trial, were raised for the first time after the State had concluded its case-in-chief, and then only by an inappropriate motion (generally alleging unconstitutionality along a front far more limited in thrust than that presently sought to be aired), submitted without comment, or illuminating argument."

Further, the Court stated (page 17a of Petitioner's brief):

> "We believe such issues are most appropriately determined upon pretrial motion and on a record there to be made which would provide the relevant evidentiary background so essential to place the constitutional questions in proper focus and perspective, and thus to insure a reasoned constitutional decision."

See also in this regard *Ellis v. Dixon, supra*, at page 464; *United States v. International Union*, 352 U.S. 567, 591; *State v. Cherry*, 224 Md. 144, 154, 167 A. 2d 328 (1961).

Petitioner, however, asserts that Maryland women and physicians have been deprived of adjudication of the underlying issues of social and constitutional importance with respect to abortions and requests that the case be remanded

for that reason. While this may, or may not, appear persuasive as a reason for remand, no authority is cited holding this to be a *ground* for remand by this Honorable Court. Furthermore, the broad social issues could not be resolved in this case since, as noted *supra*, only the narrow issue of the licensed and accredited hospital requirement is involved in this case.

There is a further reason why a remand would be most inappropriate in this case to attempt to determine these broad social issues. These issues revolve primarily around claimed rights, including the right of privacy, of a woman, and allegedly affect doctors by virtue of a physician-patient relationship, as an extension of *Griswold v. Connecticut*, 381 U.S. 479. The constitutional issues sought to be raised by Petitioner are relevant to him only through this claimed physician-patient relationship with a pregnant woman.

Petitioner, however, not only testified that he did not perform an abortion on the girl in question and that he did not counsel her as to treatment or termination of her pregnancy, he denied that she was even pregnant. How, then, can these constitutional issues be properly raised and developed by Petitioner on remand in light of that testimony? This further indicates the propriety of the matter being aired prior to trial.

CONCLUSION

The Maryland rule requiring that a challenge to the constitutionality of a criminal statute be made by a motion prior to trial is a continuation of the law which has existed in Maryland since 1852. It cannot therefore be described as a law never before announced or applied. The rule serves a legitimate purpose in that it enables the state the opportunity to seek and obtain relevant evidence without the risk of double jeopardy or of undue interruption during

trial. No adjudication of important social and constitutional issues could be resolved upon a remand even assuming that such consideration constituted an adequate ground for that relief. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,
FRANCIS X. PUGH,
Assistant Attorney General
of Maryland,
For Respondent.

APPENDIX A

Chapter 63, Section 2, of the Laws of Maryland of 1852, codified as Article 27, Section 649, Annotated Code of Maryland (1939)

649. No indictment or presentment for felony or misdemeanor shall be quashed, nor shall any judgment upon any indictment for any felony or misdemeanor, or upon any presentment, whether after verdict, by confession or otherwise, be stayed or reversed for the want of a proper or perfect venue, when the court shall appear by the indictment, inquisition or presentment, or by the statement of the venue in the margin thereof to have jurisdiction over the offense, nor for the omission or misstatement of the title, occupation or degree of the defendant or other person or persons named in the said indictment, inquisition or presentment nor, for the want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record," or of the words "with force and arms," nor for the insertion of the words "against the form of the statute," instead of "against the form of the statutes," or *vice versa*, nor for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment or making the presentment, or on an impossible day, or on a day that never happened, or by reason of any mere defect or imperfection in matters of form which shall not tend to the prejudice of the defendant, nor for any matter or cause which might have been a subject of demurrer to the indictment, inquisition or presentment.

APPENDIX B

Rule 3, General Rules of Practice and Procedure of Maryland (effective January 1, 1950 until recodified as Maryland Rule 725 on January 1, 1957).

Rule 3. Pleadings and Motions Before Trial; Defenses and Objections.

(a) *Pleadings and motions.* Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, not guilty by reason of insanity as provided by statute, guilty and *nolo contendere*. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief.

(b) *The motion raising defenses and objections.*

(1) *Defenses and objections which may be raised.* Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) *Defenses and objections which must be raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of making motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) *Hearing on motion.* A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. All issues of fact raised by such motions may be determined by the court without a jury or on affidavits or in such other manner as the court may direct.

(5) *Effect of determination.* If a motion is determined adversely to the defendant he shall be permitted to plead if he had not previously pleaded. A plea previously entered shall stand. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment or information.

(6) *Motion in writing.* A motion other than one made during a trial or a hearing shall be in writing. It shall state the grounds upon which it is made and shall set forth the relief or order sought.